February 20, 2005

To: Supreme Court Clerk, MSC_clerk@courts.mi.gov

Re: Public Comments from interested parties for ADM File No. 2003-62

From: Daniel Dziedzic, ddziedzic@prodigy.net

I am a concerned citizen and I recently discovered on the web that new Rules for Professional Conduct are being reviewed and updated by the Michigan Supreme Court. By the making the Rules it is clear that the Supreme Court wants to produce a high level of service to our State's citizens from the legal profession. I would like to provide input based on my experience of being on the front lines of trying to learn how the legal system works for an ordinary citizen. My experience is that we clients simply "do not know what we do not know" when interacting with attorneys and the result is that we are vulnerable to maneuvers by attorneys that are potentially extremely damaging to our interests. The Rules form the framework for defining Professional Conduct of Attorneys in Michigan and are, therefore, very important. I would like to submit a request that the court consider a number of issues in the text of the next iteration of the Rules.

Estate Planning for the Elderly – Estate planning for elderly individuals is an important and expanding area of law. The process of estate planning often involves the elderly and, at times, the very elderly as well as members of their family. Many of the elderly may be capable of understanding the problems of dealing with complex legal matters, but more often really require help and guidance. Because of the unique role of the attorney the elderly seem to believe that their attorney will always act in their interest. In doing so the elderly client is especially vulnerable to poor representation and may not be able to differentiate what is truly in their and their heir's best interest. I hope that the new rules will explicitly address this area and define responsibilities of attorneys who are working with the elderly. The elderly require a high degree of respect and care. I would go so far as to say that it would be highly desirable for a social scientist that specializes in understanding and protecting the interest of the elderly be involved in the transactions that involve important decisions between attorneys and the elderly, especially as they relate to Estate Planning.

Family Role in Estate Planning – The issue of estate planning directly and indirectly involves family members. Often family members assume the lawyer represents the combined interests of the family unit. This would appear to be a "common sense" type of understanding of the relationship of the family to the attorney. This assumption would also appear convenient, economical, and in the best interest of harmony of all family members who often wish to honor the wishes of their elder parents. The family members do not understand that their interests are not necessarily being represented in the estate planning process and that the attorney representing the estate owner may have his or her own separate agenda. It is commonplace for attorneys to view family members in an estate planning agreement as potential adversaries and they assume that they must preemptively protect themselves from potential litigation. The attorney is in a unique

position to "require" family members to act in ways they do not understand and that end up being against their own best interest. To balance this inequity I ask that the Rules require the estate planning attorneys to make an explicit, affirmative statement directly to family members in writing that during estate planning, even though they may be "beneficiaries", that their interests are potentially at risk. I would submit that it is as inadvisable for family members to enter into an estate planning agreement without an attorney representing their interest as it would be for them to enter a criminal proceeding without an attorney representing their interests.

Indemnification – I request that the Rules indicate that an attorney shall not require indemnification for legal services in any form from clients and stakeholders in a legal process, especially when indemnification is unlimited in amount, broad in time and involves joint liability. An exception is in business dealings where it is reasonable to believe that the parties involved understand the implications of the indemnification process (e.g. when lawyers are usually retained to represent the interests of business entities that understand the principals of indemnification). A lawyer who advises individuals into an indemnification arrangement is simply taking advantage of that individual who often has no concept of the significance of what the process of indemnification means. This is especially true if the attorney is acting as a trustee in a transaction. Indemnification turns the trustee's role on its head! Instead of a trustee protecting the potential interests of the parties involved, the parties are really protecting the trustee by insuring his financial interests. Another problem with indemnification is that whatever protections are afforded by the Michigan Attorney Grievance Commission (see below) may be circumvented where the indemnified attorney is involved. The Michigan Attorney Grievance Commission clearly states that the attorney can be represented by counsel. It does not explicitly address the case where the attorney involved is indemnified by the complainant because of a pre-existing indemnification agreement. I have asked practicing attorneys about this point specifically and they simply do not know whether an indemnification agreement can be invoked in a grievance proceeding. I currently have a request into the Grievance Administrator to clarify this point for the record. In any event, I request that the Rules and the Grievance Commission explicitly spell out the provisions that obtain for this situation. There is no profession that I am aware of – doctors, dentists, engineers, etc. – except the legal profession that uses the process of indemnification to disadvantage the parties they are meant to serve in their daily transactions. This unfair practice, which virtually begs being abused, should be stopped. There are other more equitable ways to achieve legitimate protection when it is warranted.

Active vs. passive surveillance of legal impropriety. Passive surveillance is monitoring outcomes by having the victim bring the problem to the attention of the overseeing agent for examination. Passive surveillance for improprieties of attorneys cannot substitute for a system where citizens and clients are actively empowered to protect their own interests. As I stated before most clients simply do not know what they do not know about the workings of legal representation. As the Supreme Court acknowledges in the initial promulgation of the Rules, attorneys are in a unique and powerful role and abuse of their responsibilities, whether unintentionally or intentionally, can be devastating to citizens

who rely on the legal system to protect their interests. The Michigan Attorney Grievance Commission seems like a needed and potentially useful oversight body. However, in reviewing the material available on the web relating to this body, I am concerned. The Commission reports that 4,000 complaints are received annually and that fully eighty-five percent are dismissed because "most files are unsubstantiated i.e., the lawyer has done nothing wrong". I think a much more likely explanation is that the grievance process is excessively user-friendly for attorneys. To the potential complainant the process appears to be a "time-sink" of quasi-legal maneuvering that, at the least, is extremely difficult to manage. It is a wonder that 4,000 claims are actually filed per year! A more likely explanation for the extraordinarily high closure rate than the one the Commission offers is that a beleaguered, dispirited base of complainants simply cannot effectively make their way through this process. So instead of a passive, after-the-fact, bureaucratic grievance process I would request that the Court consider adding the following suggestions as part of the text and/or administration of the Rules:

- All clients should be made aware of a client's Bill of Rights in writing when they enter into any arrangement with an attorney. The Bill of Rights should contain the protections that are conferred on the client by the law and the Rules of Professional Conduct. Eighty-five percent of complainants in the grievance process seem to not understand the grounds for a grievance. At the least this points to a crying need to inform and empower clients to understand exactly what they should expect and demand from their attorneys.

- During the review of the Rules, paid professional ethicists, religious leaders, professional advocates for clients, academics, and interested lay people should form a professional review board that can serve as a separate, independent input into the final form of the Rules. They could provide up-to-date thinking about the Professional Rules of Conduct from a non-lawyer's perspective. They could bring a fresh and, I believe, a different perspective to the content of the Rules.

- I request that the Rules be revised no longer than every 5 years. The world has changed several times over since the Rules were first promulgated in 1988.

I have lived in Michigan my entire life. Attorneys play a special and critical role in ensuring that society can work well. Citizens, attorneys and the court all have a common goal - to enhance the quality of justice, both for clients who rely on the legal profession for help in their lives and for hardworking, honest attorneys who are trying to do their best for their clients.

I would like to thank the court for the opportunity to express my point of view into ways to revise your professional rules of professional conduct.